RECORD AND BRIEFS

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In The
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.
AND JACK C. PHILLIPS, PETITIONERS

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS.

ON WRIT OF CERTIORARI TO
THE COLORADO COURT OF APPEALS

BRIEF FOR NATIONAL LGBTQ TASK FORCE, ET AL. AS AMICI CURIAE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

BRIEF FOR NATIONAL LGBTQ TASK FORCE, ET AL. AS AMICI CURIAE SUPPORTING RESPONDENTS 1

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 6

ARGUMENT 7

A. Under an Exception Permitting Refusal of Service Based on the Business Owner's Beliefs, LGBTQ Persons of Color Would Be Subject to Race-Based Discrimination 7

B. Fully Enforceable Anti-Discrimination Laws Are Critical for LGBTQ People to Achieve Full Equality 11

C. Accounts of Discrimination From LGBTQ People of Color Highlight the Need for Public-Accommodations Laws Without Exceptions for Business Owners' Personal Beliefs 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

B.K.B. v. Maui Police Dep't, 276 F.3d 1091 (9th Cir. 2002) 9

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 7

Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025 (5th Cir. 1980) 9

Katzenbach v. McClung, 379 U.S. 294 (1964) 7

Newman v. Piggie Park Enters., 256 F. Supp. 941 (D.S.C. 1966) 7, 8

Newman v. Piggie Park Enters., 390 U.S. 400 (1968) 8

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 12

OTHER AUTHORITIES

A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context, 47 Wake Forest L. Rev. 173 (Spring 2012) 12

TABLE OF AUTHORITIES—Continued

Page

Brad Sears and Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact* in *Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide (BNA)* 11

Christy Mallory, et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community* (Williams Inst. Mar. 2015) 11

Jack Harrison-Quintana & Chris Quach, *Injustice at Every Turn: A look at multiracial respondents in the National Transgender Discrimination Survey* 10

Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991) 9

Out of the Past: 400 Years of Lesbian and Gay History in America (PBS Online) 11

BRIEF FOR NATIONAL LGBTQ TASK FORCE, ET AL. AS AMICI CURIAE SUPPORTING RESPONDENTS

Amici curiae National LGBTQ Task Force, et al., respectfully submit this brief in support of respondents.[1]

INTEREST OF AMICUS CURIAE

The **National LGBTQ Task Force** is the nation's oldest national LGBTQ advocacy group. As a progressive social-justice organization, the Task Force works to achieve full freedom, justice, and equality for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) people and their families. The Task Force trains and mobilizes activists across the Nation to combat discrimination against LGBTQ people in every aspect of their lives, including housing, employment, healthcare, retirement, and basic human rights. Recognizing that LGBTQ persons of color are subject to multifaceted discrimination, the Task Force is also committed to racial justice. To that end, the Task Force hosts the Racial Justice Institute at its annual Creating Change Conference, which equips individuals with

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. Petitioners and respondent Colorado Civil Rights Commission have filed blanket consents to the filing of amicus briefs. A letter from respondents Charlie Craig and David Mullins consenting to the filing of this brief has been submitted to the Court.

skills to advance both LGBTQ freedom and racial equality.

GLAAD is the world's largest LGBTQ media advocacy organization committed to growing acceptance of LGBTQ people. As a part of GLAAD's core work, it runs public education campaigns and educates reporters on the full ramifications of religious exemption legislation to ensure accurate coverage. The religious exemption agenda at the core of this case puts the LGBTQ community at direct risk and disproportionately affects LGBTQ people of color who face additional institutional discrimination.

Basic Rights Oregon is Oregon's largest nonprofit LGBTQ advocacy group. Basic Rights Oregon works to ensure that all LGBTQ Oregonians experience equality by building a broad and inclusive politically powerful movement, shifting public opinion, and achieving policy victories

Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR) believes that all people should be able to create relationships with those they love and build the families that they hope for without judgment or barriers. COLOR works to ensure that each person is treated with respect and that all families are treated with dignity. COLOR will always speak out against attempts to push personal beliefs in order to deny the health, rights and dignity of Latinas, their families, and their communities.

The **LGBT Technology Partnership** is the premier organization representing the interests of the LGBT community with regards to communica-

tions and technology issues. Through education of members and communications providers, as well as direct engagement with policy makers at the local, state, and federal level the Partnership advocates on behalf of the needs of its LGBT members across the country. With the continued and increased adoption of technology, access to faster communications platforms, and more reliable and stable services comes greater community connections and empowerment. Part of the work that the Partnership does is using technology to serve underserved and homeless LGBT populations and to empower LGBT communities through technology. The type of employment and personal discrimination exemplified by this case is at the core of the work that the Partnership is trying to eradicate through use of technology.

The **National Coalition for LGBT Health** is committed to improving the health and well-being of lesbian, gay, bisexual, and transgender individuals through federal and local advocacy, education, and research. The Coalition has adopted a "Social Determinants of Health" (SDoH) frame and vision. Health care and healthy communities are built on a foundation that must be set long before medical care or intervention is required. That foundation for health begins in homes, schools, communities, jobs, and neighborhoods.

The **National Equality Action Team (NEAT)** harnesses the unique power of LGBTQ+ people, their allies, and community partners to educate and take collective action across issues in the fight for justice. Denying a person service simply because of the immutable characteristics that they possess goes

against the very core of our Nation's ideals and the words inscribed in our founding documents.

The **National Queer Asian Pacific Islander Alliance** is a federation of LGBT Asian American, South Asian, Southeast Asian, and Pacific Islander (APIs) organizations. NQAPIA builds the capacity of local LGBT API groups, develops leadership, promotes visibility, educates the community, invigorates grassroots organizing, encourages collaborations, and challenges anti-LGBT bias and racism.

The **Sexuality and Information Council of the United States (SIECUS)** is a national organization focused on creating a world where all aspects of an individual's sexuality are treated with dignity and respect. SIECUS approaches its work with the understanding that individuals experience the world through multiple identities and work to address the multiple types of discrimination experienced by individuals, including LGBTQ people of color. SIECUS believes that prejudice and discrimination based on sexual orientation is unethical and immoral; individuals have the right to live in accordance with their sexual orientation, whether they are lesbian, gay, bisexual, or queer; and the legal system should guarantee the civil rights and protection of all people, regardless of sexual orientation.

SisterSong: National Women of Color Reproductive Justice Collective is committed to ensuring that women of color are no longer exploited, discriminated against, or harmed by the systems that have historically denied them equal rights and dignity. SisterSong works to amplify women of

color's lived experiences and leverage their collective power to push back on any attempts to deny their bodily autonomy, disrespect their families, or withhold the power, access and resources that all women need to make healthy decisions about their bodies, sexuality, relationships and families.

The **Autistic Self Advocacy Network** seeks to advance the principles of the disability rights movement with regard to autism. ASAN believes that the goal of autism advocacy should be a world in which autistic people enjoy equal access, rights, and opportunities. We work to empower autistic people across the world to take control of our own lives and the future of our common community, and seek to organize the autistic community to ensure our voices are heard in the national conversation about us.

Witness to Mass Incarceration is and will be a digital library of individuals whose lives and the lives of their family will be memorialized. Our goal is to place women's and LGBTQIA people's experience at the center of the fight for alternatives to mass incarceration. We work to change the narrative from invisibility and victimization to empowerment through documentation, organizing, and advocacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Business owners' personal beliefs should not exempt commercial enterprises from the reach of generally applicable public-accommodations laws that prohibit discrimination on the basis of sexual orientation.

For decades, this Court's decisions have established that a business owner's views on race or interracial couples—no matter how sincere or deeply held, and even if religion based—do not justify an exception allowing race-based discrimination. But recognizing such an exception for a business owner's views on sexual orientation or gender identity would exacerbate the multiple layers of discrimination that LGBTQ people of color already face in public accommodations, housing, and employment. Indeed, it could open the door to legally permissible discrimination based on the intersections of race, sexual orientation, and gender identity.

Moreover, LGBTQ people should not be subject to second-rate anti-discrimination laws with exceptions that do not apply to other protected classes. To recognize the exception asserted in this case could thwart the advancement that LGBTQ people have made toward full equality by sending the message that discrimination against LGBTQ people is worthy of protection. Despite progress, discrimination against LGBTQ people—and especially LGBTQ people of color—is pervasive and ongoing. A handful of recent accounts of such discrimination is collected at the end of this brief. These real-life experiences show why laws prohibiting sexual-orientation

discrimination in public accommodations must be fully enforced.

ARGUMENT

A. Under an Exception Permitting Refusal of Service Based on the Business Owner's Beliefs, LGBTQ Persons of Color Would Be Subject to Race-Based Discrimination

It is firmly established that commercial enterprises are not exempt from public-accommodations laws prohibiting discrimination on the basis of race, no matter the business owner's sincere, deeply held beliefs. But if businesses are permitted to refuse service because of sexual orientation, they will also be able to engage in race-based discrimination against LGBTQ people of color.

After the enactment of the federal Civil Rights Act of 1964 and state public-accommodations laws prohibiting race-based discrimination, businesses tested multiple legal theories to evade the reach of these laws, claiming that they interfered with business owners' religious and moral beliefs. These attempts were universally rejected. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (rejecting business owner's argument that his right to pursue his calling permits him to select his customers); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding application of Civil Rights Act of 1964 to restaurant in the face of owner's arguments about interference with constitutional right to control property and choose with whom to deal). In *Newman v. Piggie Park Enterprises*, the defendant asserted a First Amendment exemption from Title II of the Civil Rights Act of 1964, asserting a "right to

refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs." 256 F. Supp. 941, 945 (D.S.C. 1966). When that case reached this Court, the Court called the asserted exemption "patently frivolous." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968).

Cognizant of these decisions, petitioners and the United States attempt to distinguish between discrimination on the basis of race and discrimination on the basis of sexual orientation. The U.S. Solicitor General concedes that a State's interest in eradicating race-based discrimination can override a business owner's deeply held beliefs and expression about race. *See* U.S. *Amicus* Br. 32 (State's interest "may justify even those applications of a public accommodations law that infringe on First Amendment freedoms"). But he asserts that public-accommodations laws must yield to a business owner's deeply held beliefs about marriage because States do not have as compelling an interest in eradicating discrimination on the basis of sexual orientation as they do in ending race-based discrimination. *See ibid.*

But that argument fails to apprehend how discrimination often works against LGBTQ people of color. LGBTQ people of color are often subject to multifaceted discrimination. It may be impossible to know whether an act of discrimination is motivated by race or sexual orientation. If businesses are permitted to refuse to provide goods and services to LGBTQ people based on the owners' beliefs, that exception could easily be used to mask what is actually race-based discrimination. For example, a

cake decorator could refuse to provide a wedding cake to an LGBTQ person of color *based on race* but could justify that discrimination by asserting personal opposition to marriage by same-sex couples.

Relatedly, discrimination against an LGBTQ person may occur not solely because of the person's race or not solely because of the person's sexual orientation or gender identity, but because of the combination of both. Courts have recognized that when an individual is a member of more than one protected class, discrimination against that person may be based on the combination of both protected characteristics. *See, e.g., B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1101 (9th Cir. 2002) (collecting decisions). For example, a business that does not discriminate against African Americans or women generally may still discriminate against African American women. *See Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980). Literature refers to this form of discrimination as "intersectionality." *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991). Permitting an exception for discrimination based on sexual orientation or gender identity would open the door to intersectional discrimination against LGBTQ people of color.

LGBTQ people of color are particularly susceptible to this multifaceted discrimination. They are far more likely to be the subject of bias than white LGBTQ people, and acts of bias are likelier to be more extreme. This is highlighted in the nationwide study of anti-transgender discrimination conducted by the National LGBTQ Task Force and the National

Center for Transgender Equality. That study found that although discrimination was pervasive for all respondents surveyed, the combination of anti-transgender bias and persistent structural and interpersonal acts of racism was especially devastating for multiracial transgender people and other people of color. Jack Harrison-Quintana & Chris Quach, *Injustice at Every Turn: A look at multiracial respondents in the National Transgender Discrimination Survey* at 1.[2] Multiracial transgender and gender non-conforming people often live in extreme poverty, with 23% reporting a household income of less than $10,000 per year. *Ibid.* This is higher than the rate for transgender people of all races (15%), the general U.S. multiracial population rate (15%), and almost six times the general U.S. population rate (4%).

Weakening legal protections for LGBTQ people would only exacerbate the challenges already facing LGBTQ people of color and would permit race-based discrimination. State public-accommodation laws prohibiting discrimination on the basis of sexual orientation must be able to be enforced against commercial enterprises without an exception for the business owners' personal beliefs.

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[2] http://www.thetaskforce.org/injustice-every-turn-report-national-transgender-discrimination-survey-lmultiracial-respondents/.

B. Fully Enforceable Anti-Discrimination Laws Are Critical for LGBTQ People to Achieve Full Equality

Additionally, were this Court to accept a distinction between a State's interest in ending race-based discrimination and its interest in eradicating discrimination on the basis of sexual orientation, it would enshrine in this Court's decisions a two-tiered system in which LGBTQ people are entitled only to second-class protection. That would be intolerable to LGBTQ people, who need the full protection of the laws to achieve full equality in society.

As this Court well knows, this Nation's history of discrimination against LGBTQ people is long and severe. LGBTQ people have been forced from their homes, fired from their jobs, denied service at businesses, banished from their families, subjected to violence by members of the public and law enforcement, and much more. Even worse, federal and state governments have often singled out LGBTQ people for official condemnation. *See generally Out of the Past: 400 Years of Lesbian and Gay History in America* (PBS Online); Brad Sears and Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact*, in Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide (BNA); Christy Mallory, et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community* (Williams Inst. Mar. 2015).

Many States are trying to counteract the history of invidious discrimination against LGBTQ people. That is well within their purview: States are

empowered "to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Roberts v. United States Jaycees*, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring in part and concurring in judgment). That is as true for LGBTQ people as it is for people of color. Through their public-accommodations laws, Colorado and twenty other States and the District of Columbia have taken action to root out discrimination against LGBTQ people. But the roots of hatred run deep.

Public-accommodations laws—and in particular this Court's decisions upholding those laws against assertions that they must yield to one's deeply held beliefs—played a critical role not only in advancing the rights of African Americans but in changing society's views. Because the Civil Rights Act of 1964 was enacted without exemptions for religious or moral objectors, it helped solidify public rejection of segregation. Had those exemptions been included (they were proposed), the Civil Rights Act would have been far less effective. Indeed, were those exemptions in place, they would have prolonged segregation by sending the message that deeply held racism deserves protection. *See* Michael Kent Curtis, *A Unique Religious Exemption from Anti-discrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 Wake Forest L. Rev. 173, 176 (Spring 2012).

Colorado and other States should be able to pursue an end to discrimination against LGBTQ people to the same degree that they pursue an end to discrimination on the basis of race.

C. Accounts of Discrimination From LGBTQ People of Color Highlight the Need for Public-Accommodations Laws Without Exceptions for Business Owners' Personal Beliefs

Amici know that, despite the enormous progress made by LGBTQ people in achieving civil rights, discrimination remains pervasive. Amici present here selected firsthand accounts of discrimination collected from colleagues and associates who are LGBTQ people of color. These are only a tiny sample of the types of real-life actions taken on a daily basis against LGBTQ people, who deserve full access to commercial opportunities. Many of these are examples of businesses seeking to make their employees conform to gendered expectations, while other accounts demonstrate a continued desire to exclude LGBTQ people. And several show how difficult it can be to separate discrimination on the basis of race from discrimination on the basis of sexual orientation or gender identity, when the target of the discrimination is an LGBTQ person of color.

These real-life experiences of LGBTQ people of color—and countless other untold ones—highlight the need for public-accommodations laws that can be enforced fully to place LGBTQ people on an equal footing.

Naomi Washington Leapheart: This past June, my wife, Kentina, and I consecrated our legal marriage with a sacred wedding ceremony in the presence of our loved ones on a beach in Cape May, New Jersey. Three months later, we're still basking in the joy of that day. Our joy is sweeter because in

many ways, it is our resistance—not everyone was supportive of our union. In fact, we still ache as we remember that in January, a prospective wedding planner we considered hiring told us she couldn't work with us because she believes in the biblical definition of marriage, which, to her, made ours illegitimate. Kentina and I are Christian ministers. Our faith is precisely what animates our love and the decision we made to make a spiritual commitment to each other and to our communities. Yes, we are grateful that we could be legally married in any State in the country. Yet the rejection we experienced during one of the happiest seasons of our lives starkly reminded us that there is still so much more work to be done.

Preston Mitchum: I am a black gay and queer man from the Midwest. I have experienced discrimination based on my race, sexual orientation, and class, more times than imaginable. Because of what it means to be intersectional—that is, multiple marginalized identities existing at once—it is nearly impossible to determine whether I am experiencing discrimination and mistreatment on the basis of me being unapologetically Black or queer; and many times, both. In an ever-expanding and gentrifying Washington, D.C., where I now reside, it's commonplace to be followed by law enforcement and be watched as I'm entering more expensive stores. While browsing in Georgetown, a majority-white area, I was once told to leave a store because I "was taking too long looking" just to be mocked by other staff. Not only was I in this particular store for less than 10 minutes, I was certainly not the only one. I was profiled, targeted, and belittled because of where

I was and who I was perceived to be. No one defended me, no one made me feel human; and these are not isolated incidences. Every day, LGBTQ people of color wake up understanding that we can be targeted at the intersection of our identities, and it is a perpetual process of healing and understanding.

K'Danz Cruz: I was working at a retail store, and I was never allowed to start my gender-affirming transition because the management team would tell me that customers would feel uncomfortable. I was repeatedly told that the customer always comes first and that due to customer apprehension, I could not transition.

Sophia Jackson: I was working at a rehabilitation facility in San Francisco, California, which works with women and children. One day while I was on duty, my immediate supervisor said that she needed to have a conversation with me. I believed we were going to talk about me finally getting hired full time, but she started the conversation by telling me "that the Lord had brought me before her during her prayer time." After entering into a moment of prayer she disclosed to me that she was concerned that the way I dressed and carried myself was unpleasing to God, and that I "knew God had created me to be a wife." At that point she asked me if I was involved in a homosexual relationship with the woman that she had seen me coming to church with. I did not respond; rather, I asked why she was asking me that question because we belonged to the same church at the time. I was curious as to why this was suddenly an issue. She said that I was sending mixed messages because I

presented as male. I ended up having to go on leave due to the stress, and while I was on leave my employment was terminated. I have been unemployed from that field of work ever since.

Victoria Rodriguez-Roldan: When my wife was working at a tutoring center, although the manager knew about me, my wife was forced to keep my existence hidden from the children. My wife actually had to make up a fictional male fiancé and later husband to account for the wedding rings to anyone who asked. The business claimed to be supportive of us but did not want to "upset the parents."

Taissa Morimoto: Born to immigrant parents and raised in a predominately white neighborhood, I spent most of my adolescence trying to fit in. In order to assimilate, I would always try to hide my differences, including aspects of my race and sexual orientation. For most of my life, I didn't feel comfortable to dress how I want, love whom I want, or be whom I want because I felt like I had to choose safety and security over being myself. I would comply when cashiers told me I should smile more, I would keep silent when restaurant owners made racist comments, and I refused to hold my girlfriend's hand in public, all because I was scared for my safety. I was scared something could happen to me.

CONCLUSION

The judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted,

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